Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended By the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

COMMENTS OF THE FIBER-TO-THE-HOME COUNCIL IN THE FURTHER NOTICE OF PROPOSED RULEMAKING

The Fiber-to-the-Home Council ("FTTH Council"), through its undersigned counsel, hereby respectfully submits its comments to the Federal Communications Commission (('Commission'') in response to the Further Notice of Proposed Rulemaking *("Local Franchising FNPRM"*) issued in the above-captioned proceeding.'

The FTTH Council is a non-profit organization established in 2001. Its mission is to educate the public and government officials about Fiber-to-the-Home ("FTTH") and to promote and accelerate FTTH and the resulting quality of life enhancements such networks make possible. The FTTH Council's members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and

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1 *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of* ***1984*** *as amended by the Cable Television Consumer Protection and*

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content-provider companies, as well as traditional service providers, utilities, and municipalities. As of today, the FTTH Council has over 135 entities as members.[2]

In conjunction with adopting the Report and Order *("Local Franchising Order,"* FCC 06-180) to address concerns about the application of the cable franchising process to new entrants, the Commission initiated a Further Notice of Proposed Rulemaking to determine whether its determinations regarding procedures and requirements in the franchising process also should be extended to cable operators that obtained franchises prior to the Commission's *Local Franchising Order* – both incumbent providers ("incumbents") and their current wireline competitors ("competing providers") – and, if so, how that might best be achieved. The Commission tentatively concluded that "the findings in this Order should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs."[3] The FTTH Council agrees with the Commission's tentative conclusion but believes it does not go far enough. The Commission should act to ease burdens for existing cable operators now, *prior* to the renewal of their franchises, and has the legal authority to take such action.[4]

Competition Act of 1992, Further Notice of Proposed Rulemaking, MB Docket No. 05-311, Rel. March 5, 2007.

2 A complete list of FTTH Council members can be found on the organization's website, http:l/www.ftthcouncil.org.

3 *Local Franchising Order* at ¶140.

4 In the *Local Franchising Order (see* n. *2),* the Commission found that it lacked "a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises." It thus limited its decision to "actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority" and not to "the reasonableness of demands made by state level franchising authorities." The comments herein are similarly limited insofar as the Commission's findings in the *Local Franchising Order* were linked to the language in section 621(a)(1) dealing with the award of additional competition franchises. The FTTH

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I. Findings in the *Local Franchising Order* Apply Immediately to Existing Providers and their Franchise Agreements

In the ***Local Franchising Order,*** the Commission issued a set of five findings to "eliminate unreasonable barriers to entry into the cable market" and "encourage investment in broadband facilities."[5] All but two of these can be readily applied to all existing franchisees prior to the date they would be eligible for franchise renewal. Only the findings dealing with the timing of competitive entry and build-out requirements arguably are relevant exclusively to new entrants (post-adoption of the ***Local Franchising Order***).[6] The findings related to franchise fees, public, educational, and government ("PEG") channels and institutional networks ("I-Nets"), and mixed-use networks relate both to the award of franchise to a new entrant and the ongoing operations of incumbent and competing existing franchisees. More specifically, the Commission made the following legal conclusions:

Franchise Fees

> "[A] cable operator is not required to pay franchise fees on revenues from non cable-services."[7]

Council notes in Section I of these comments, however, that other findings were not so linked, and, as they are statutory interpretations of the relevant provisions by the Commission, they should apply to all cable operators, regardless of status.

5 ***Id.*** at ¶5.

6 In making these findings, the Commission linked each to the requirement in section 621(a)(1) that LFAs cannot unreasonably refuse to award a franchise. ***See, Id.*** at ¶67, "Failure of an LFA to act within the allotted time constitutes an unreasonable refusal to award the franchise under Section 621(a)(1)." Also ***See, Id.*** at ¶91, "we find that Section 621(a)(1) prohibits LFAs from refusing to award a competitive franchise because the applicant will not agree to unreasonable build-out requirements." As discussed below in Section 111, competing providers, which entered prior to the issuance of the ***Local Franchising Order,*** should be able to get out from under unreasonable build-out requirements.

7 Id. at ¶98.

"[N]on-incidental franchise-related costs required by LFAs must count toward the 5 percent franchise fee cap" and "the term 'incidental' in Section 622(g)(2)(D) should be limited to the lists of incidentals in the statutory provision, as well as other minor expenses."[8]

"[A]ny requests made by LFAs unrelated to the provision of cable services...are subject to the statutory 5 percent franchise fee cap."[9]

""Payments made in support of PEG access facilities are considered franchise fees and are subject to the 5 percent cap."[10]

PEG/Institutional Networks

"[C]ompletely duplicative PEG and I-Net requirements imposed by LFAs would be unreasonable.""

"Payments for I-Nets that ultimately are not constructed are unreasonable."[12]

Sharing of the ***pro rata*** costs of PEG facilities among franchisees "is ***per se*** reasonable."[13]

Mixed-Use Networks

"We clarify that LFAs' jurisdiction applies only to the provision of cable services over cable systems."[14]

These legal findings by the Commission interpret provisions of the statute applicable to all cable operators without qualification. As such, and because they bear very much on ongoing

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8 Id. at ¶¶99, 103. Also, see, ¶104, "non-incidental costs include...attorney fees and consultant fees" and "application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided an LFA, any requirement to lease or purchase equipment from an LFA at prices higher that market value."

9 Id. at ¶107.

10 Id. at ¶109.

11 Id. at ¶119.

12 Id.

13 Id.

14 Id. at 7121.

operations of existing providers, the Commission should declare they are effective for existing franchise agreements as of the effective date of the *Local Franchising Order* and are to be enforced accordingly. This Commission ruling is of sufficient importance to the public interest that its effectiveness should not be forestalled by possibly ten years or more while waiting for existing franchise agreements to expire. In addition, as a policy matter, because new entrants will operate under these rules, they should apply at the same time to existing franchisees as well. This is the type of "good" level playing field approach – whereby barriers are removed for new entrants and rules are then removed for existing franchisees – that the Commission should follow.[15]

11. The Renewal Process for Existing Cable Operators Must Be Interpreted Consistent with the *Local Franchising Order*

As stated above, the FTTH Council agrees with the Commission's tentative conclusion regarding the applicability of the findings of the *Local Franchising Order* as existing franchisees negotiate renewal with LFAs.[16] However, as stated above, the FTTH Council does not believe

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15 The Commission noted in the *Local Franchising Order* (¶140) that many incumbent cable operators have most favored nation provisions in their franchise agreements or are covered by state "level-playing field" statutes. These provisions provide another legal basis for the incumbent provider to invoke the findings of the Commission and enable the incumbent to react to new entry. The Commission should recognize the "two-way street" effect of these provisions, facilitating their use by incumbent operators to respond to competitors in their territory.

16 Local Franchising Order at ¶140. The processes and standards for renewal are set forth in Section 626 (47 U.S.C. $546). It is important to note that a cable operator does not have to seek renewal of a franchise. As stated in the *Report of the Committee on Energy and Commerce, Cable Franchise Policy and Communications Act of 1984*, Report 98-934, August 1, 1984 (p. 72), "The provisions contained in this section are not mandatory...The purpose of this section is to establish a process which protects the cable operator against an unfair denial of renewal by the franchising authority. It is intended that a cable operator whose past performance and proposal for future performance meet the standards established by this section be granted renewal." An existing cable operator could choose

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an existing cable operator cannot avail itself immediately of the findings regarding franchise fees, PEG/I-Nets, and mixed-used networks. In addition, as described below, existing cable operators should be able to invoke the modification of franchise provisions to enable it to respond to changed competitive conditions.

111. The Commission Should Use its Authority to Precisely Define the Meaning of "Commercially Impracticable" in Section 625 (Modification of Franchise Obligations) to Enable Existing Cable Operators to Respond to Competitive Entry

The FTTH Council is not suggesting that the Commission perforce modify existing franchise agreements. Fortunately, Title VI of the Communications Act, as amended, contains a vehicle by which the Commission's interpretations may be implemented for existing operators prior to the time of franchise renewal. Section 625 sets forth the requirements and procedures for the modification of current franchise obligations. It provides that a cable operator may obtain such modifications for requirements related to facilities or equipment if "(i) it is commercially impracticable for the operator to comply with such requirement, and (ii) the proposal.. .for modification.. .is appropriate because of the commercial impracticability."[17] A cable operator requests modifications from the franchising authority, which is directed to act within 120 days, and, if denied, a cable operator may seek judicial review by the court pursuant to section 635.

The purpose of section 625 can be found in the *Report of the House Energy and Commerce Committee on the Cable Franchise Policy and Communications Act of 1984 ("House Report")*. It states, "Modifications in franchise obligations may be necessary to adapt to changes

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to forgo renewal and instead apply for a new franchise, one which would, by necessity be subject to the findings of the Commission's *Local Franchising Order*. Of course, in a such an instance, many of the Commission's premises for its findings would no longer be applicable.

17 47 U.S.C. §545(a)(1).

in market conditions and consumer demands."[18] This makes this provision a potentially very useful tool in enabling existing operators to respond to new entry.

Section 625(f) provides a definition of "commercially impracticable." However, the definition does not fully explicate the term, focusing more on the question of whether the "change in conditions...is beyond the control of the operator and the nonoccurrence...was a basic assumption on which the requirement was based."" The *House Report* provides greater insight by stating the definition is "as it is in the Uniform Commercial Code, Section 2-615."[20] But, here again, there is lack of precision.

It is for that reason that the FTTH Council asks the Commission to use its authority pursuant to sections 201(b) and 4(i)[21] to adopt rules more precisely defining the term "commercially impracticable." The FTTH Council suggests first that existing franchisees who are competing providers should be deemed to meet the commercial impracticability standard immediately.[22] After all, these competing providers are essentially no different in terms of their

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18 *Report of the Committee on Energy and Commerce, Cable Franchise Policy and Communications Act of 1984,* Report 98-934, August 1, 1984, p. 71.

19 Of course, it is extremely doubtful that any current franchise agreement was premised on the potential that there would be new wireline competitors who would have different franchise obligations – as provided for in the *Local Franchising Order*.

20 *Id.*

21 47 U.S.C. §201(b); 47 U.S.C. §154(i).

22 In addition to declaring that competing providers should be able to invoke the commercial impracticability provision immediately, the FTTH Council suggests that the Commission also find that this provision has particular applicability to any build-out requirements in a competing provider's existing franchise agreement. In its findings in the *Local Franchising Order* regarding build-out requirements, the Commission found, "Build-out requirements thus impose significant financial risks on competitive applicants, who must incur substantial construction costs to deploy facilities within the franchise area in exchange for the opportunity to capture a relatively small percentage of the market." It then concluded that build-out requirements would seem reasonable if they took into account "the new entrant's market penetration" and were based on the new entrant's

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competitive status from new entrants to whom the Commission's *Local Franchising Order* applies. Their competitive disadvantage vis-a-vis the incumbent operator is the very demonstration of commercial impracticability. Moreover, the competing providers should not be penalized for their willingness to take greater risks and enter the market prior to the Commission's decision.[23]

As for incumbent providers, the FTTH Council suggests that once a new entrant has begun to build its network in a specific area pursuant to the terms of the *Local Franchising Order*, the condition of commercial impracticability for the incumbent takes effect. There is a sound basis for such a finding. The construction of a competing cable network is an act of great commitment. Because substantial amounts of capital must be raised and expended prior to signing up the first customer and because this capital is sunk, competing providers do not begin this effort without a serious intention to follow through on the project. Knowing this reality, incumbent cable operators have an incentive – and a need – to react to the competition as quickly as possible. If they are permitted to do so, the likelihood is that prices will drop and service choice and customer responsiveness will increase. It is for these reasons that the beginning of network construction by a new entrant should enable the incumbent operator to invoke the "commercially impracticable" circumstance in that particular territory where new entry is occurring.

"market success." *(Local Franchising Order* at ¶¶88, 89.) Such conclusions are equally applicable to competing providers with existing franchises, and such operators should not be bound by unreasonable build-out requirements, even though they pre-date the *Local Franchising Order*.

23 The Commission in the *Local Franchising Order* (7139) notes that the Broadband Service Providers Association made this argument in its comments.

CONCLUSION

The FTTH Council applauds the Commission for undertaking the *Local Franchising FNPRM* and seeking to close it so promptly. The Commission's key findings in the *Local Franchising Order* regarding franchise fees, PEG/I-Nets, and mixed-use networks are clearly applicable to all existing franchisees (and the determinations regarding permissible build-out requirements are applicable to all competitive existing franchisees). The Commission has sufficient authority to interpret the statutory provisions dealing with these matters and make them effective as of the effective date of the *Local Franchising Order*. Moreover, the Commission can provide further impetus to a "good" level-playing field by providing guidance as to term "commercial impracticability" so that existing cable operators can obtain relief by seeking to modify their franchise agreements.

Respectfully submitted,

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